

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HECTOR DELEON,

Plaintiff,

vs.

PHH MORTGAGE CORPORATION,

Defendant.

§
§
§
§
§
§
§
§
§
§

SA-19-CV-01342-FB

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

To the Honorable United States District Judge Fred Biery:

This Report and Recommendation concerns the above-styled cause of action, which was referred to the undersigned for all pretrial proceedings pursuant to Western District of Texas Local Rule CV-72 and Appendix C [#7]. The undersigned has authority to enter this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that this case be dismissed for want of prosecution.

I. Background

Plaintiff originally filed this action in state court, and Defendant removed his Petition to this Court on November 15, 2019. Defendant promptly filed a Motion to Dismiss, which remains pending [#3]. Defendant's Motion to Dismiss was filed on November 22, 2019, meaning Plaintiff's response to the motion was due on or before December 6, 2019. *See* Loc. R. CV-7(e) (responses to dispositive motions such as a motion to dismiss are due within fourteen days of motion's filing). Pursuant to Local Rule CV-7(e), if there is no response filed within the time period prescribed by the rules, the court may grant the motion as unopposed.

In light of Plaintiff's failure to respond to Defendant's Motion and the deficiencies in Plaintiff's Petition identified by Defendant, on December 9, 2019, the Court ordered Plaintiff to file an amended pleading that conforms with the Federal Rules of Civil Procedure [#9]. The Court reminded Plaintiff that this pleading should be styled as a Complaint and satisfy Rule 9(b) of the Federal Rules of Civil Procedure as to Plaintiff's fraud claim. The Court also informed Plaintiff that a failure to follow the Court's order and to file the amended pleading could result in Defendant's motion to dismiss being granted or this case being dismissed for want of prosecution. The deadline for filing the amended pleading was December 16, 2019. To date, Plaintiff has not filed the ordered Complaint.

Rule 41(b) authorizes the district court to dismiss an action for want of prosecution *sua sponte* whenever necessary to achieve the orderly and expeditious disposition of cases. Fed. R. Civ. P. 41(b); *Anthony v. Marion County General Hospital*, 617 F.2d 1164, 1167 (5th Cir. 1980). Due to Plaintiff's failure to respond to Defendant's Motion to Dismiss and failure to follow the Court's Order to file an amended pleading conforming with federal pleading standards, the Court will recommend the District Court dismiss this case for want of prosecution pursuant to Rule 41(b).

II. Recommendation

Having considered the record in this case, the undersigned recommends that Plaintiff's claims be **DISMISSED** for want of prosecution.

III. Instructions for Service and Notice of Right to Object/Appeal.

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified

mail, return receipt requested. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the un-objected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED this 19th day of December, 2019.



ELIZABETH S. ("BETSY") CHESTNEY
UNITED STATES MAGISTRATE JUDGE